

No. 18-0317

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**FILED**  
Nov 13, 2018  
DEBORAH S. HUNT, Clerk

In re: JOSEPH HARDESTY; DEREK CHIPMAN;     )  
 MADELINE HICKEY,                                     )  
    )  
 Petitioners.   )

ORDER

Before: SILER, ROGERS, and COOK, Circuit Judges.

Plaintiffs Joseph Hardesty, Derek Chipman, and Madeline Hickey petition to appeal the order denying class certification of their claims for unpaid overtime under Ohio’s minimum wage law, Ohio Rev. Code § 4111.01, *et seq.* See Fed. R. Civ. P. 23(f). Defendants Kroger Company and Kroger G.O. LLC oppose the petition to appeal.

Under Rule 23(f), we have discretion to hear an appeal from the denial of class certification. See *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002). Rule 23(f) appeals are not to be routinely accepted, and interlocutory review is not favored “in ordinary cases, which involve the application of well-established standards to the facts of a particular case.” *Id.* at 959–60. We consider the following factors in determining whether to permit the plaintiffs’ interlocutory appeal: (1) whether the plaintiffs are likely to succeed on appeal under the deferential abuse-of-discretion standard; (2) whether the cost of continuing the litigation for either the plaintiffs or the defendants presents such a barrier that subsequent review is hampered; (3) whether the case presents a novel or unsettled question of law; and (4) the procedural posture of the case before the district court. *Id.* at 960.

A district court has substantial discretion in determining whether it will certify a class. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013);

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*Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 536 (6th Cir. 2012). Thus, appellate “review is ‘very limited,’ and we will reverse ‘only if a strong showing is made that the district court clearly abused its discretion.’” *Sandusky Wellness Ctr., LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 466 (6th Cir. 2017) (quoting *Young*, 693 F.3d at 536), *cert. denied*, 138 S. Ct. 1284 (2018). “An abuse of discretion occurs if the district court relies on clearly erroneous findings of fact, applies the wrong legal standard, misapplies the correct legal standard when reaching a conclusion, or makes a clear error of judgment.” *Young*, 693 F.3d at 536. Given this deferential standard of review, the plaintiffs have not shown a substantial likelihood of success on the merits.

In addition, consideration of the other factors does not support an interlocutory appeal. The district court certified the misclassification claims of the plaintiffs and the opt-in plaintiffs for a collective action under the Fair Labor Standards Act (the “FLSA”). The plaintiffs may litigate their individual state claims along with the FLSA claims and, if necessary, appeal the denial of class certification upon the entry of a final judgment. The denial of class certification is not the death knell of the litigation, and the posture of the action below does not favor an immediate appeal.

Accordingly, the petition to appeal is **DENIED**.

ENTERED BY ORDER OF THE COURT



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Deborah S. Hunt, Clerk

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt  
Clerk

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Re: Case No. 18-317, *In re: Joseph Hardesty, et al*  
Originating Case No. : 1:16-cv-00298

Dear Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Michelle M. Davis  
Case Manager  
Direct Dial No. 513-564-7025

cc: Mr. Richard W. Nagel

Enclosure

No mandate to issue